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2 UNITED STATES DISTRICT COURT
3 DISTRICT OF NEVADA

4 ROBERT DOUGLAS PETERSON,
5
6
7 v.
8 NETHANJAH BREITENBACH, *et al.*,
9 Respondents.

Case No. 3:24-cv-00274-ART-CSD
ORDER

10 This habeas corpus action was initiated *pro se* by Robert Douglas Peterson,
11 who is incarcerated at Nevada's Lovelock Correctional Center. (See ECF No. 4
12 (*pro se* habeas petition).) Peterson is serving an aggregate term of life in prison,
13 with the possibility of parole after 24 years, on convictions in Nevada's Eleventh
14 Judicial District Court, in Mineral County, of one count of luring a child and four
15 counts of use of a minor in producing pornography. (ECF No. 4 at 2.) The
16 convictions followed his pleas of guilty to those crimes. (*Id.*)

17 The Court appointed counsel for Peterson (ECF No. 3), and entered a
18 scheduling order (ECF No. 9), which granted Peterson an opportunity to file an
19 amended habeas petition with the benefit of counsel. Peterson's amended
20 petition was due on February 11, 2025. (ECF No. 11.)

21 On January 10, 2025, Peterson filed a motion, styled as a motion for leave
22 to conduct discovery, requesting leave of court to serve on the Mineral County
23 District Attorney's Office a subpoena to obtain materials the prosecution
24 disclosed, or made available, in pretrial proceedings. (ECF No. 13.) According to
25 Peterson's motion, his counsel has attempted to obtain such material from his
26 former attorneys but has been unable to do so, as they apparently have not
27 preserved all such material in their files. (ECF No. 13 at 3–4.) Respondents filed
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1 an opposition to the motion (ECF No. 15), and Peterson filed a reply (ECF No.
2 17).

3 Rule 6(a) of the Rules Governing § 2254 Cases provides that “[a] judge
4 may, for good cause, authorize a party to conduct discovery under the Federal
5 Rules of Civil Procedure” In *Bracy v. Gramley*, 520 U.S. 899 (1997), the
6 Supreme Court held that Rule 6 is to be applied consistently with its prior
7 opinion in *Harris v. Nelson*, 394 U.S. 286 (1969), which expressly called for the
8 adoption of the rule. 520 U.S. at 904, 909. In *Harris*, the Supreme Court held
9 that “where specific allegations before the court show reason to believe that the
10 petitioner may, if the facts are fully developed, be able to demonstrate that he is
11 ... entitled to relief, it is the duty of the court to provide the necessary facilities
12 and procedures for an adequate inquiry.” 394 U.S. at 300. In *Bracy*, a
13 unanimous Supreme Court overturned a decision denying discovery where the
14 petitioner’s claim of judicial bias in his particular case was based on “only a
15 theory,” where the claim was “not supported by any solid evidence” with regard
16 to the theory, and where the Supreme Court expressly noted that “[i]t may well
17 be, as the Court of Appeals predicted, that petitioner will be unable to obtain
18 evidence sufficient to support” the theory. 520 U.S. at 908–09. The Ninth Circuit
19 Court of Appeals has held—consistent with *Bracy* and *Harris*—that discovery is
20 available to habeas petitioners, at the discretion of the district court judge, in
21 cases where the discovery sought might provide support for a claim. *See, e.g.*,
22 *Pham v. Terhune*, 400 F.3d 740, 743 (9th Cir. 2005); *Jones v. Wood*, 114 F.3d
23 1002, 1009 (9th Cir. 1997); *see also Osborne v. District Attorney's Office*, 521
24 F.3d 1118, 1133 (9th Cir. 2008), *rev'd on other grounds, District Attorney's Office*
25 *v. Osborne*, 557 U.S. 52 (2009) (in discussing *Jones*, the court reinforced the
26 point that a court should allow discovery that only “may establish” a factual
27 basis for the petitioner's claim).

1 In his motion, Peterson explains that two of the claims in his *pro se* petition
2 assert that the prosecution overcharged him, by basing the charges on the
3 number of portrayals of minors produced or possessed, rather than on the
4 number of incidents involved. (ECF No. 13 at 4–6; *see also* ECF No. 4 at 28–36.)
5 Peterson goes on to claim that his trial counsel was ineffective, in violation of his
6 federal constitutional rights, for not researching the law and advising him that
7 he was overcharged before he accepted a plea offer and pled guilty to five crimes.
8 (*Id.*) Peterson states that he needs to obtain the materials disclosed to the defense
9 before he pled guilty to substantiate his claim that he was overcharged and to
10 show that his trial counsel was ineffective for not doing the necessary legal
11 research and recognizing as much, and for not advising him accordingly before
12 he pled guilty. (*Id.*)

13 Similar to part of the discovery sought in *Jones*, Peterson seeks this
14 “discovery” in order to recreate his own files. *See Jones*, 114 F.3d at 1009. In
15 *Jones*, the court held that the district court erred in denying the petitioner’s
16 request to obtain materials from his trial lawyer, his pretrial investigator, and
17 the prosecutor in his case to reconstruct his files. *Id.* Peterson likewise seeks
18 materials that he had or that were available to him before he entered the plea
19 agreement, but that he does not now have because his former attorneys
20 apparently did not preserve his files. As Peterson makes clear, he does not seek
21 to develop new evidence.

22 Citing *Shoop v. Twyford*, 596 U.S. 811 (2022), and *Kemp v. Ryan*, 638 F.3d
23 1245 (9th Cir. 2011), Respondents argue that Peterson’s motion should be
24 denied, because under 28 U.S.C. § 2254(e)(2) and *Shinn v. Ramirez*, 596 U.S.
25 366 (2022), any evidence obtained would not be admissible to support his claims.
26 (ECF No. 15 at 2–4.) However, neither *Shoop* nor *Kemp* involved a petitioner’s
27 attempt to reconstruct his own files; both involved a petitioner seeking to develop
28 new evidence. The Court determines that *Shoop* and *Kemp* do not preclude this

1 discovery. The Court exercises its discretion to grant Peterson's motion, in the
2 interests of justice, to allow Peterson a fair opportunity to recreate his files—
3 which apparently were not preserved by his former counsel—so that he might be
4 able to substantiate habeas claims and assert those claims in a counseled
5 amended petition.

6 The Court will grant Peterson's motion and will grant him leave of court to
7 serve upon the Mineral County District Attorney's Office a subpoena to obtain a
8 complete copy of the discovery that office disclosed to his trial counsel and/or
9 the documents made available to his trial counsel before he entered his guilty
10 pleas.

11 The Court does not here reach the question whether any material obtained
12 by Peterson in response to the subpoena will ultimately be admissible under 28
13 U.S.C. § 2254(e)(2) to support his claims. Moreover, the Court does not here
14 make any comment regarding the viability or merit of any of Peterson's claims.
15 These issues will be addressed in due course, after Peterson has an opportunity
16 to attempt to reconstruct his files and an opportunity to file an amended petition
17 with the benefit of counsel.

18 It is therefore ordered that Petitioner's "Motion for Discovery" (ECF No. 13)
19 is granted. Petitioner is granted leave of court to serve upon the Mineral County
20 District Attorney's Office a subpoena as described above.

21 It is further ordered that Petitioner must serve the subpoena upon the
22 Mineral County District Attorney's Office within 14 days from the date of entry
23 of this order.


24 It is further ordered that Petitioner must file a notice informing the Court
25 of the Mineral County District Attorney's Office's response to the subpoena
26 within 7 days after receiving such response.

27 It is further ordered that Petitioner's Unopposed Motion for Extension of
28 Time to File Reply in Support of Motion for Discovery (ECF No. 16) is granted,

1 *nunc pro tunc*. Petitioner's reply in support of his motion is considered timely
2 filed and has been taken into consideration in addressing his motion.

3 It is further ordered that Petitioner's Unopposed Motion for Extension
4 of Time to File Amended Petition (ECF No. 18) is granted. The Court will set a
5 new deadline for the filing of Petitioner's amended petition when appropriate
6 after Petitioner receives the Mineral County District Attorney's Office's response
7 to his subpoena.

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9 DATED THIS 27th day of February, 2025.

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12 ANNE R. TRAUM
13 UNITED STATES DISTRICT JUDGE
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